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ON RELATIVE SOVEREIGNTY†

HANS AUFRICHT

I. RELATIVE VS. ABSOLUTE SOVEREIGNTY

The dogma of sovereignty has repeatedly been attacked by a great number of international lawyers during the past two or three decades.¹ Many students of the problem have proposed to consider sovereignty not as an *absolute* concept, but rather as a *relative* one.² In order to clarify the meaning of "relative sovereignty" those basic elements must be sought out which constitute the underlying relationships implied in the term "relative sovereignty."

II. DOMESTIC NORM AND INTERNATIONAL LAW

The term sovereignty may be used in a relative sense with reference to the question whether "supremacy of law" can be attributed to domestic or

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¹See e.g., Kelsen, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* (1920); Lansing, *Notes on World Sovereignty* (1921) 15 AM. J. INT. L. 13; Verdross, *DIE EINHEIT DES RECHTLICHEN WELTBILDES* (1923); Politis, *Le problème des limitations de la souveraineté* (1925) 6 RECUEIL DES COURS (Hague Academy of Int. Law) 5; Garner, *Limitations on National Sovereignty in International Relations* (1925) 19 AM. POL. SCI. REV. 1; Brierly, *THE LAW OF NATIONS* (2d ed. 1936) 34 ff.; Keeton & Schwarzenberger, *MAKING INTERNATIONAL LAW WORK* (1939) c. 4; Eagleton, *Organization of the Community of Nations* (1942) 36 AM. J. INT. L. 229, 234.

²The relative character of sovereignty has been emphasized, moreover, in Garner, *RECENT DEVELOPMENTS IN INTERNATIONAL LAW* (1925) 812. "The task of reconstructing and increasing the effectiveness of international law raises the question of how far certain of its existing fundamental bases need to be altered. It is now generally admitted that certain changes of this character are desirable. . . . *The theories of absolute sovereignty and equality of states which have heretofore been recognized as basic principles should be definitely eliminated so that law will conform more nearly to the facts.*" (Italics supplied). See also Eagleton, *INTERNATIONAL GOVERNMENT* (1932) 29. "Sovereignty is not a unit, which a state either has or does not have; it is a relative term." Cf. 1 Oppenheim, *INTERNATIONAL LAW* (5th ed. by Lauterpacht, 1935) 117. "The very notion of International Law as a body of rules of conduct binding upon States irrespective of their Municipal Law and legislation implies the idea of their subjection to International Law and makes it impossible to accept their claim to absolute sovereignty in the international sphere." (Italics supplied). On absolute sovereignty, see Sukienicki, *LA SOUVERAINETÉ DES ÉTATS EN DROIT INTERNATIONAL MODERNE* (1927) 59. See also, Shotwell, *THE GREAT DECISION* (1944) 202. "Absolute, unqualified and unchecked sovereignty is a conception of anarchy."

international law; in other words, whether the domestic or the international norm is supreme.

It is certainly justifiable to speak of a national legal order as the "highest order" so long as attention is focussed on the sphere of exclusive jurisdiction conferred on a State by international law.³ Within that sphere of jurisdiction the domestic legal order may be supreme notwithstanding the fact that a wider view may include in a complete system of law the superior, international law.

The Constitution of the United States, for instance, is called the "supreme law"⁴ or "sovereign" in relation to state constitutions or city charters which are deemed of a lower level than the Constitution. Most of the questions arising in domestic law are not affected by international law. Hence, it is often legitimate to ignore the existence of international law for the sake of simplicity.⁵

However, assuming that international law is of a higher level than domestic law it is evident that the sovereignty of the domestic law is not absolute. On the premise that international law binds individual states, domestic norms are superior only in regard to subordinate norms, but in principle, inferior in relation to the superior international norm. Thus, in considering both domestic and international norms in their mutual relationship, it would be inconsistent to characterize the international as well as the domestic norm as supreme.

The superiority of international law over and above constitutional law has been reaffirmed by the Permanent Court of International Justice in its Advisory Opinion No. 23.

³See P. C. I. J., Ser. B, No. 4, p. 23 (1923). "From one point of view it might well be said that the jurisdiction of the State is 'exclusive' within the limits fixed by international law—using this expression in its wider sense, embracing both customary law as well as particular treaty law."

⁴See the Supremacy Clause of the U. S. CONST. Art. VI, § 2. "This Constitution, and the Laws which shall be made in pursuance thereof . . . shall be the supreme Law of the Land."

⁵If in such reasoning the attribute of sovereignty is ascribed to the domestic legal order it assumes the character of a "neglective fiction." Cf. VAHINGER, *THE PHILOSOPHY OF "AS IF"* (Transl. by Ogden, 1924) 16. "I include under this term various methods in which the deviation from reality manifests itself specifically in the neglect of certain elements. The factor common to all fictions in this class consists in a neglect of important elements of reality. As a rule the reason for the formation of these fictions is to be sought in the highly intricate character of the facts which make theoretical treatment exceedingly difficult owing to their unusual complexity. . . . Since, then, the material is too complicated and confused for thought to be able to break up into its component elements. . . . Thought makes use of an artifice by means of which it provisionally and temporarily neglects a number of characters and selects from them the more important phenomena."

... a State cannot adduce as against another State its Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.⁶

In this case and in related instances the implied or express doctrine of the sovereignty of international law means superiority of the international norm over the domestic norm.⁷

III. NORM—PERSON RELATIONS

A. *Sovereignty and Independence*

An entirely different meaning of relative sovereignty is implied if attention is focussed, not on the relationship between international and domestic norms, but on the position of the "independent" state in international law. In this context the term "independent state" itself requires an explanation, the more so since the designation "independent" and "sovereign" state are frequently used as interchangeable.⁸ Yet, what is meant by "independent" state is equally open to discussion. It might indicate that a certain legal entity, usually called state in the sense of international law, is considered independent of any superior rule. If this interpretation is accepted, the independent state is considered an entirely boundless, supreme unit; in other words, the absolute highest entity.⁹

The term "independent state" is also susceptible to another construction, whereby independence would mean only independence from any superior personal unit, but not independence from law. In this connection it may be recalled that the feudal period of history was characterized by a struggle for the highest rank within the feudal hierarchy of persons.¹⁰ The fight for

⁶*Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, P. C. I. J., Ser. A/B, No. 44.

⁷See *The International Law of the Future: Postulates, Principles and Proposals* (Supp. 1944) 38 AM. J. INT. L. 41, 73. See also Kunz, *The International Law of the Future* (1944) 38 AM. POL. SCI. REV. 354, 358.

⁸Cf., dissenting opinion of Judge Anzilotti in *Customs Regime between Austria and Germany*, P. C. I. J., Ser. A/B, No. 41, p. 57 (1931). "Independence as thus understood is really no more than the normal condition of States according to international law;—it may also be described as *sovereignty* (*suprema potestas*) or *external sovereignty* by which is meant that the state has over it no other authority than that of international law." See Sfériades, *Principes généraux du droit international de la paix* (1930) 34 RECUEIL DES COURS 348. "Et en effet, la notion de l'indépendance rentre dans celle de la souveraineté, car on ne saurait comprendre un État souverain que ne serait pas même temps un État indépendant." See also 1 MOORE, A DIGEST OF INTERNATIONAL LAW (1906) 18 ff.

⁹See *infra* p. 145.

¹⁰For the historical development of this doctrine see SERENI, *THE ITALIAN CONCEPTION OF INTERNATIONAL LAW* (1943) c. 4; see also BUTLER & MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* (1928) 3. Cf. the statement of the Dominican

political power, which was waged among a great number of competitive forces, aimed at the elimination of superior personal units. This, in many cases, did not necessarily imply the denial of a superior law.

When, in the twelfth and thirteenth centuries, several Italian city states attained a status of *superiorem non recognoscentem*, such status meant *superiorem personam non recognoscentem*, but not necessarily the non-recognition of a higher law. Even Bodin's doctrine of sovereignty has been frequently misconstrued, for it has been overlooked that Bodin's struggle against the papacy did not lead to the assertion of the absolute sovereignty of the "Prince"; on the contrary, the subjection of the state to law was still maintained.¹¹

The idea of a hierarchy of persons as means of legal organization has been maintained even after the feudal period of history had come to an end. As for the legal character of the "supreme" person or the "supreme" persons in the so-called modern state system two opinions have been advanced. One tends to combine independence from any superior person with the independence from law. This line of argumentation leads inescapably to the denial of international law as such, for the independent or sovereign state is conceived as actually severed from international law.¹² According to the

Cajetan: "Faut-il par ce mot de *princes* entendre seulement les princes qui n'ont pas de supérieur? . . . Par ce mot de prince, il faut entendre un État parfait; tels sont: le Pape, l'Empereur, un Roi, un État libre, c'est à dire qui n'a pas de supérieur, qui est assimilable à un prince." *LA DOCTRINE SCOLASTIQUE DU DROIT DE GUERRE* (Transl. by Vanderpool, 1919) 78.

¹¹Cf. BODIN, *LES SIX LIVRES DE LA REPUBLIQUE* (1577) 133. "La puissance absolue des Princes et seigneuries souveraines, ne s'estend aucunement aux loix de Dieu, et de nature." See also Gardot, *Jean Bodin: Sa Place parmi les Fondateurs du Droit International* (1934) 50 *RECUEIL DES COURS* 549; SABINE, *A HISTORY OF POLITICAL THEORY* (1937) 408.

¹²Brierly criticizes Vattel for having advanced a doctrine of the independence of the State which is incompatible with the subjection of the State to international law. See BRIERLY, *op. cit. supra* note 1, at 32. "By making independence the 'natural' state of nations, he made it impossible to explain or justify their subjection to law." It seems, however, that Vattel attempted to reconcile the rights of independent States with their obligations under international law when he wrote: "... Nations or sovereign States must be regarded as so many free persons living together in the state of nature. Proof can be had from works on the natural law that liberty and independence belong to man by his very nature, and that they can not be taken from him without his consent . . . the whole body of the Nation, the State, so long as it has not voluntarily submitted to other men or other Nations, remains absolutely free and independent. As men are subject to the laws of nature, and as their union in civil society can not exempt them from the obligation of observing those laws, since in that union they remain none the less men, the whole Nation, whose common will is but the outcome of the united wills of the citizens remains subject to the laws of nature and is bound to respect them in all its undertakings. And since *right* is derived from *obligation*, as we have just remarked, a Nation has the same rights that nature gives to men for the fulfillment of their duties. We must therefore apply to nations the rules of the natural law to discover what are

other opinion the independent state is considered in its normal relations as independent of any superior personal unit, but in many respects bound by superior law. In this legal relationship the independent state does not appear as entirely boundless, as placed in a sphere of lawlessness, but is considered in its relation to the controlling international norm.

Hence, the absolute sovereign state would be equivalent to a state type which could be characterized as independent of any superior person and simultaneously independent of any superior law. Relative sovereignty, on the other hand, would in this connection indicate the relationship between a state dependent upon international law, but independent of any superior personal unit,¹³ at least in its normal relations. In order to visualize this peculiar legal situation of the state, it has been suggested that the state, in the sense of international law, be defined as that personal legal unit which is immediately subject to international law or the *immediate addressee of international law*.¹⁴

The legal status of independence has not been reserved to one state alone; it has been extended to all members of the community of nations of equal rank. Accordingly it has been repeatedly recognized that the status of independence represents a certain rank within an underlying hierarchy of persons. For example, the collective recognition of Greece as an independent State was styled as follows:

The Courts of Great Britain, France, and Russia, exercising the power conveyed to them by the Greek nation, to make choice of a Sovereign for Greece, *raised to the rank of an Independent State*. . . .¹⁵

On the whole, all states which are deemed immediate addressees of international law (*völkerrechtsummittelbar*) are considered of equal rank, a rank, that is conferred on them by international law and which therefore can be explained only in terms of international law. When Chief Justice Marshall

their obligations and their rights; hence the *Law of Nations* is in its origin merely the *Law of Nature applied to Nations*." Vattel, *The Law of Nations or the Principles of Natural Law* (1758) in *THE CLASSICS OF INTERNATIONAL LAW* (1916) 3 ff.

¹³See dissenting opinion of Judge Anzilotti in P. C. I. J., Ser. A/B, No. 41, p. 57 (1931). "The conception of independence regarded as the normal characteristic of States as subjects of international law cannot be better defined than by comparing it with the exceptional and, to some extent abnormal class of States, known as 'dependent States.' These are States subject to the authority of one or more other States."

¹⁴For the term *Völkerrechtsummittelbarkeit* see VERDROSS, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* (1926) 118. "Die ausschliesslich dem Völkerrecht untergeordneten Staaten nennt man herkömmlicherweise 'souveräne' Staaten. 'Souveränität' ist also nur ein anderer Ausdruck für die ausschliessliche Völkerrechtsummittelbarkeit." For "immediate addressee of international law" see Aufricht, *Personality in International Law* (1943) 37 AM. POL. SCI. REV. 217, 235.

¹⁵2 HERTSLET, *THE MAP OF EUROPE BY TREATY* (1875) 893.

once referred to the equality of independent States, he did not look upon the principle of the equality of states as self-evident. On the contrary, he derived it from what he called "general law" when he ruled:

No *principle of general law* is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights.¹⁶

B. *Equality and mutual independence of states*

The legal relationship between two or more independent states constitutes another aspect of "relative sovereignty." The mutual independence of sovereign States has several clearly discernible legal consequences. For example, the generally accepted rule of international law, that no State in the sense of international law¹⁷ can be brought by another State before an international tribunal without its consent, can directly be traced back to the principle of the equality or mutual independence of states.¹⁸ Similarly, an independent State is, under customary international law, immune from the jurisdiction of another State.¹⁹

"Relative sovereignty" in this connection means, therefore, that a definite rank in the hierarchy of persons confers on these persons mutual rights and duties which cannot be claimed by any person of a lower rank.

The principle that States are equal as to certain relations has, at times, been styled their sovereignty, and the standards of equality before international law have been established by international law itself.²⁰

¹⁶The *Antelope*, 10 Wheat. 66, 122 (U. S. 1825). Italics supplied. For the difference between "equality before the law" and "equality in the sense of legal capacity for rights" see DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920) 3, 4, 336. For "mutual independence," see 1 OPPENHEIM, *loc. cit. supra* note 2; See also Pallieri on *reciproca independence*, (1938) DIRITTO INTERNAZIONALE PUBBLICO 47.

¹⁷For the term "State in the sense of international law" see KUNZ, *DIE STAATEN-VERBINDUNGEN* (1929) 20.

¹⁸P. C. I. J., Ser. B, No. 5, p. 27 (1923). "This rule . . . only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."

¹⁹Cf. LEAGUE OF NATIONS. COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW; see especially the Report by Matsuda on the *Competence of the Courts in regard to Foreign States*. "The question whether a State may, in any respect, be subject to the jurisdiction of the courts of another State *is connected with the rights of the State to independence*. . . . As regards acts of its Government and public administration, a State ought to be—as, indeed it is—entirely immune from the jurisdiction of another State. . . . There is, however, some difference of opinion when we come to consider acts accomplished by a State . . . in a private capacity." (Italics supplied). League of Nations Document V, Legal, 1929, V. 9. See also ALLEN, *THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS* (1933).

²⁰See e.g., the general principles concerning the termination of a Mandate. League of Nations Document P. M. C. Minutes 20, p. 228 ff. See also Evans, *The General Principles Concerning the Termination of a Mandate* (1932) 26 AM. J. INT. L. 735, 749.

In short, "relative sovereignty" as used with reference to the mutual independence of States is equivalent with the "sovereign equality of States."²¹

C. *Supranational persons*

The assumption that the "independent" state is the *absolute* highest person in the underlying hierarchy of persons is frequently at variance with legal experience. For instance, by submitting an international dispute to an international court the parties in dispute recognize in principle the superiority of the international tribunal. Accordingly they pledge to accept and to execute, in good faith the decision of such a tribunal.²²

As previously indicated the requirement of a special agreement for the purpose of bringing an international dispute before an international tribunal can be explained by the rule that the sovereign state is "normally" independent of any superior person.²³ However, the status of independence under customary law may at any moment be qualified by an international agreement as evidenced by the practice of international judicial agencies.

An international tribunal is authorized to operate only by virtue of an agreement between the parties concerned. From this legal situation the erroneous conclusion that the substantive content of an international award is entirely dependent upon the will of the parties in dispute has repeatedly been derived. But it should be remembered that the consent expressed in a *compromis ad hoc*, in a general arbitration treaty, or in the adherence to the optional clause²⁴ concerning the jurisdiction of the Permanent Court of International Justice can, in principle, not be revoked at will.

In short, the supranational character of an international tribunal can be inferred from its authority to issue rulings addressed to so-called independent states²⁵ as well as from the binding character of its decisions.

²¹See Point 4 of the Moscow Declaration of October 30, 1943. "That they recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security." Cf. Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization* (1944) 53 YALE L. J. 207.

²²See e.g., Article 5 of the special agreement between the United States and the United States of Venezuela in relation to the case of *The Orinoco Steamship Company* which reads as follows: "The said Arbitral Tribunal shall, in each case submitted to it, determine, decide and make its award, in accordance with justice and equity. *Its decisions in each case shall be accepted and upheld by the United States of America and the United States of Venezuela as final and conclusive.*" (Italics supplied). For the text of the protocol see FONTES IURIS GENTIUM (5th ed. Bruns), Ser. A, § I, Tomus II, 246, 250.

²³See *supra* note 18.

²⁴For the optional clause, see STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, Art. 36, § 2.

²⁵See STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, Art. 34.

It cannot be denied that it is a controversial issue whether or not an international tribunal enjoys legal personality under international law. Those authors who are inclined to reserve international personality to independent states²⁶ are bound to deny the legal personality of international tribunals.²⁷ By contrast, if an international person is defined as the author or the addressee of valid international acts, international tribunals may be included in this definition.

Advocates of absolute state sovereignty will necessarily disprove both the supranational character as well as the legal personality of an international tribunal. Nevertheless, it should be clear that States, though normally the supreme persons in the hierarchy of persons, are relegated to an inferior rank the moment they submit their case to an international tribunal. In international judicial procedures the tribunal and not the parties to an international dispute appear on the highest level of the hierarchy of persons.

It is not so easy to ascribe supranational personality to the League of Nations as, for instance, to the Permanent Court of International Justice. The League of Nations can be considered as having acted in the capacity of a supranational person,²⁸ by exercising certain functions. A resolution of the League of Nations Council, for example, addressed to two or more parties in dispute, had legal effects upon these parties; wherefore it is proper to say that in this respect the League had the character of a supranational corporate person.²⁹ In general, however, the League of Nations was a society of nations (*Société des nations*) rather than a supranational corporate body.

The question whether an international administrative body is of an international or supranational character cannot be decided once and for all; every individual case must be scrutinized on its own merits. If an international administrative agency is authorized to act on behalf of its members³⁰ and

²⁶Cf. WILSON, *HANDBOOK OF INTERNATIONAL LAW* (3d ed. 1939) "Only states in the strict sense of the word are recognized as full legal persons in international law."

²⁷There are some authors who are inclined to deny the legal personality of international tribunals, but who try at the same time to uphold their authority to issue legally valid acts. See e.g., Pallieri, *op. cit. supra* note 17, at 263. Such an approach, however, is legal mysticism, for it is inconceivable that judicial acts may emanate from an impersonal entity. If the legal validity of international awards is admitted there is no reason to deny the legal personality of the agency whence these acts originate. See also United States of America on behalf of Lehigh Valley Railroad Company, Canadian Car and Foundry, *et. al. v. Germany* (Supp. 1939) 33 AM. J. INT. L. 770.

²⁸For the concept of a supranational juristic person see FRANKENSTEIN, 1 *INTERNATIONALES PRIVATRECHT* (1926) 505 ff. Frankenstein applies here the term "überstaatliche juristische Person."

²⁹For actions of the Council under Art. 15, § 6 of the Covenant see RAY, *COMMENTAIRE DU PACTE DE LA SOCIÉTÉ DES NATIONS* (1930) 73, 77, 225. For analogous competences of the Assembly see Art. 15, § 9.

³⁰International agencies designed to act on behalf of the community of nations have

does not require for its actions the unanimous consent of all its members, the supranational character of such an agency can, with reason, be assumed. On the other hand, international agencies requiring for their measures the unanimous consent of the members or the ratification of their acts, or both, constitute just an association of nations for a more or less definite purpose, but they cannot be classified as supranational agencies.³¹

In sum, the term "relative sovereignty" indicates in certain cases the legal relationship between a supranational agency or supranational person and an "independent" state.

D. Absolute sovereignty

The doctrine of "relative" sovereignty can also be contrasted with a doctrine of "absolute" sovereignty which explicitly denies the validity of international law and which, by implication, denies the coexistence of states.

In accordance with the fundamental principle of the National Socialist jurisprudence, "Law is what is advantageous to the national community" (*Recht ist was der Volksgemeinschaft nützt*), the German Reich is justified in disregarding any legal obligation which is incompatible with the real or alleged advantage of the German nation.³² Thus, the virtual independence from international law can be proclaimed whenever it serves the purpose of the National Socialists. From this viewpoint, not the international, but the domestic legal order is paramount, and domestic law prevails whenever a conflict between these two legal spheres arises.³³

By denying the validity of supranational law and at the same time the right to equality³⁴ of the individual members of the community of nations, the National Socialists are apt to support German claims for unrivaled legal superiority with respect to the rest of the world, unlimited by any legal obligation to international norms or *vis-a-vis* independent states.

E. Internal sovereignty

"Relative" sovereignty may also mean "internal sovereignty" or, in Bodin's words, *summa potestas in subditos*.³⁵ In Bodin's system this maxim does not exclude a legal connection between domestic and international law, it indi-

been called by Verdross: *Staatsgemeinschaftsorgane*. See VERDROSS, *VÖLKERRECHT* (1937) 104.

³¹See Aufricht, *Post-War Planning and Limitation of Sovereignty* (1944) 38 AM. J. INT L. 123.

³²For this doctrine and its implications see Gott, *The National Socialist Doctrine of International Law* (1938) 32 AM. J. INT L. 708, 709.

³³See SCHECHER, *DEUTSCHES AUSSENSTAATSRECHT* (1933) 9, 12, 17.

³⁴See *supra* note 21.

³⁵BODIN, *DE REPUBLICA LIBRI SEX* (1586) Bk. I, c. VIII.

cates a legal relationship between constitutional law and domestic agencies *vis-a-vis* subordinated legal spheres and organs. Within a state there are many "legal units"³⁶ on different levels within a hierarchy of legal units. Accordingly internal sovereignty denotes relative superiority within the state.³⁷ In the *Cayuga Indians* the international tribunal held:

So far as an Indian tribe *exists as a legal unit, it is by virtue of the domestic law of the sovereign nation* within whose territory the tribe occupies the land, and so far only as that law recognizes it.³⁸

This sentence is obviously to be understood as a reference to "relative" sovereignty within the domestic legal system,³⁹ and the relationship between the nation and the Indian tribe is correctly characterized as a relationship of two legal units comprised in one system.

F. Sovereignty and the private individual

The overwhelming majority of writers on international law seem still inclined to deny to the private individual, legal personality in international law. One of the reasons for this attitude is presumably the circumstance that the private individual is not "sovereign."⁴⁰

In general, the private individual is subject to the jurisdiction of the state in which he resides or travels.⁴¹ The state, in turn, is bound by customary international law to apply certain minimum standards in the treatment of foreigners.⁴² By special agreement, states may even be obliged to adopt legal measures in behalf of their citizens.⁴³

The subjection of the private individual to the state is evidenced by

³⁶For the private individual as legal unit see *infra* note 40.

³⁷See BRIERLY, *op. cit. supra* at note 1, at 36. "In the original theory it was not the state that was sovereign, but a person or persons *within* a state that were 'sovereign' over the rest."

³⁸The United States-Great Britain: Arbitration under the Agreement of August 18, 1910 in HUDSON, CASES AND OTHER MATERIALS ON INTERNATIONAL LAW (1929) 12. (Italics supplied).

³⁹*Ibid.* "The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain." See *infra* note 50 for territorial sovereignty.

⁴⁰For additional reasons why the private individual is customarily not considered a person under international law see Aufrecht, *Personality in International Law* (1943) 37 AM. POL. SCI. REV. 217, 229.

⁴¹See *supra* note 35.

⁴²See Eagleton, *Denial of Justice in International Law* (1928) 32 AM. J. INT. L. 538; Visscher, *Le Déné de Justice en Droit International* (1935) 52 RECUEIL DES COURS 369.

⁴³See *e.g.*, the treaties for the protection of European Minorities concluded under the auspices of the League of Nations after 1919. Text in 1 HUDSON, INTERNATIONAL LEGISLATION 298, 489, 733.

many international and domestic rules and practices. For instance, the individual is obliged under domestic law to be loyal to his country and, in principle, international law does respect the allegiance of the individual to his country. Thus, even in wartime, an occupying force is not allowed to compel the inhabitants of an occupied country to swear allegiance to the invaders.⁴⁴ Another example of the dependence of the private individual upon the state to which it belongs is the rule that a private individual has no direct access to international tribunals, unless a special agreement to this effect provides the right of the private individual to appear before an international tribunal.⁴⁵

G. Sovereignty and the sphere of domestic jurisdiction

The term "relative sovereignty" is furthermore applied to the sphere of domestic jurisdiction granted by international law to independent States. "Relative sovereignty" in this sense means that the scope of the jurisdiction conferred on the State by international law is not a rigid but an elastic one.⁴⁶ This principle is a very sound one and has been reaffirmed by international tribunals. Thus the Permanent Court of International Justice held:

The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question: it depends upon the development of international relations.⁴⁷

After World War I it was hoped that progress in international relations could be achieved by restricting the "domestic jurisdiction" of states and by transferring several subject-matters from domestic jurisdiction into the international sphere. The Kellogg-Briand pact as well as the treaties for the protection of minorities, concluded under the auspices of the League of Nations, can be understood as efforts in this direction. Conversely, the attempt of the

⁴⁴See Convention (IV.) respecting the laws and customs of war on land. Signed at the Hague, October 18, 1907, Art. 45. "Any pressure on the population to take the oath to the hostile Power is prohibited." According to 2 OPPENHEIM, INTERNATIONAL LAW, *op. cit. supra* note 2, at 351, the occupant is not allowed to compel the inhabitants of the occupied country "to take an oath of allegiance. . . . On the other hand he may compel them to take an oath—sometimes called an 'oath of neutrality'—to abstain from taking up a hostile attitude against him. . . ."

⁴⁵See Seférides, *Le problème de l'accès des particuliers à des juridictions internationales* (1935) 51 RECUEIL DES COURS 46.

⁴⁶It is presumably this implication to which Kunz refers when he speaks of the relative character of sovereignty: "This sovereignty is therefore by no means an absolute conception, but an essentially relative conception which changes and is bound to change with the change of the superordinated international law." Kunz, *The "Vienna School" of International Law*, (1934) 11 N. Y. U. L. Q. REV. 370, 399. Cf. also, Politis, *Le problème des limitations de la souveraineté* (1925) 6 RECUEIL DES COURS 34.

⁴⁷P. C. I. J., Ser. B, No. 4, p. 24 (1923).

totalitarian states to rid themselves of such jurisdictional limitations and to extend the sphere of domestic jurisdiction even into fields hitherto regulated by international law, constitutes a reversal of the preceding progressive trend in international law.

Nevertheless, it must be emphasized that there is also a lower limit to the elasticity of the domestic jurisdiction. The requirements of international law concerning minimum standards of jurisdictional authority represent such limits.⁴⁸ Whenever the jurisdictional limitations imposed by international law are extended so far that a State is prevented from fulfilling its obligations under international law, the State may be threatened in its very existence and thereby be deprived of any jurisdiction whatsoever. This statement may be illustrated by the following sentence taken from one of the World Court's Advisory Opinions:

As the Court has had occasion to state in previous judgments and opinions, *restrictions on the exercise of sovereign rights* accepted by treaty by the state concerned *cannot be considered as an infringement of sovereignty*.⁴⁹

Unfortunately, this ruling is not unequivocal. Assuming that the terms "sovereign rights" and "sovereignty" are to be understood as identical, the ruling of the World Court is inconsistent. It is logically untenable to assert that limitations of sovereign rights do not constitute infringement of sovereignty. The true intention of the award would probably have been expressed more clearly by saying, *e.g.*, "that restrictions of the sphere of domestic jurisdiction do not in themselves impair the international personality of a state." Any reasoning of this kind seems to invite, however, a construction *a contrario*; for restrictions of the sphere of domestic jurisdiction would be self-defeating should they expose the international personality of the State to annihilation, since the sovereignty or sphere of domestic jurisdiction of a non-existent legal entity cannot be restricted at all.

IV. SOVEREIGNTY AND SPACE

Every rule of law is related to space. The designation of certain fields of law as American, English, and so on, implies the space element, for it indicates not only "national" legal systems but also that portion of the globe in which a certain set of rules is applicable or actually enforced.

⁴⁸See *supra* note 42.

⁴⁹P. C. I. J., Ser. B, No. 14, p. 36 (1927).

A. Territorial sovereignty exercised by individual states

The right of a state to function within a certain territory, unimpeded by any interference from the outside, is called territorial sovereignty.⁵⁰ In the award, the *Island of Palmas (or Miangas)*, the arbitrator, Dr. Max Huber, construed the nature of territorial sovereignty as follows:

The development of the national organization of states during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite state, of collective sovereignty, etc., do not fall to be considered here [*sic*], and do not, for that matter throw any doubt upon the principle which has just been enunciated

Territorial sovereignty is, in general, a situation recognized and delimited in space

Sovereignty in the relation between states signifies independence, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. . . .⁵¹

Within the sphere of territorial sovereignty the functions of a state are exercised through acts of its organs.⁵² The exclusive right of the functionaries of State *A* to act in their official capacity within a definite territory corresponds with the duty of the functionaries of States *B*, *C*, *D*, and so on, to omit actions reserved to State *A*. Only with the express consent of State *A* are functionaries of States *B*, *C*, *D*, authorized to act in official capacity within the territory of State *A*.⁵³

It may be mentioned in passing that the principle of the exclusive terri-

⁵⁰For the concept of territorial sovereignty, cf. THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW (ed. by Oppenheim 1914) 131; For the German term "Gebietshoheit," see 4 NEUMEYER, INTERNATIONALES VERWALTUNGSRECHT (1936) 121, 124; for the Italian approach, see FEDOZZI, INTRODUZIONE AL DIRITTO INTERNAZIONALE E PARTE GENERALE (1933) 349.

⁵¹See *The Island of Palmas (or Miangas)*, (1928) 22 AM. J. INT. L. 868, 875.

⁵²Some authors maintain that the State which exercises territorial sovereignty is entitled also to dispose of its territory. This approach comes very close to the Roman and Civil Law doctrines on the positive content of the concept of property. For the question of whether the relationship between State and territory can be understood in terms of an international concept of property, see WESTLAKE, *loc. cit. supra* note 50; See also Donati, *Stato e Territorio* (1914) 8 RIVISTA DI DIRITTO INTERNAZIONALE 319; (1923) 15 *id.* at 349; (1924) 16 *id.* at 47. Prager, *Eigentum und Staatsgebiet* (1934) 14 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 611. For the so-called "Kompetenztheorie," see Kelsen, ALLEGEMEINE STAATSLEHRE (1925) 137.

⁵³The actions of diplomatic representatives of State *A* on the territory of State *B* are actions of the own organs of State *A* within a foreign territorial sovereignty. For examples of acts of organs of State *A* on behalf of State *B* within the territory of State *C*, see Sereni, *Agency in International Law* (1940) 34 AM. J. INT. L. 638, 640.

torial jurisdiction is also implied in the term "territorial waters," since the right to exclude foreign functionaries and private individuals is based upon the territorial "sovereignty" of a state "over a belt of sea round its coast."⁵⁴ The decisive criterion is here, the "territorial sovereignty" of the riparian State over this part of its territory,⁵⁵ since as a description of a factual situation, "territorial waters" are a contradiction in terms.

Although "territory" is a typical "attribute" or "element" of an independent state, the question has at times been raised whether states or state-like organizations are conceivable which do not enjoy the prerogatives inherent in territorial sovereignty. The dominant doctrine tends to consider "territory," or at least "stable frontiers," as an indispensable prerequisite of statehood. Yet, several scholars are willing to recognize, on certain conditions, even nomadic tribes as "States."⁵⁶

B. Limitations of territorial sovereignty

The exclusive territorial jurisdiction of a state is, or may be, restricted with respect to certain matters. Such limitations of territorial sovereignty are usually based upon customary international or treaty law.

The outstanding example of customary rules limiting territorial sovereignty are the rules concerning the immunities and privileges of diplomatic representatives.⁵⁷ These rules constitute noteworthy exceptions to the general principle that only the functionaries of the receiving State are permitted to act in official capacity within its territory. The receiving State is bound to omit the application of certain measures *vis-a-vis* diplomatic representatives. For instance, it grants exemptions from taxation⁵⁸ and customs duties.⁵⁹ Moreover, the receiving State is bound to permit within its territory, the

⁵⁴Cf. *Second Report submitted to the Council by the Preparatory Committee for the Codification Conference*. Text in (1930) 24 AM. J. INT. L. 3, 26.

⁵⁵See JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* (1927) c. 2. Under the heading "Sovereignty over Territorial Waters," Jessup writes as follows: "It is recognized that the use of the word sovereignty involves difficulties, but it is here used to denote that exclusive power of disposition and control which each nation concededly exercises over its land territory." *Id.* at 116.

⁵⁶Reference to the principle of territorial sovereignty is to be found also in the questionnaire of the League of Nations concerning the admission of new members. See League of Nations Document A.91.1921.VII., p. 3. Question 3 of the questionnaire reads as follows: "Does the country possess a stable government and fixed frontiers?" For the issue whether Nomads too might be considered as States, see LAPRADELLE, *LA FRONTIÈRE* (1928) 13. Lapradelle agrees with Kelsen, *Théorie générale de l'État* (1926) 43 *REVUE DE DROIT PUBLIC* 561, that stable frontiers are by no means an indispensable prerequisite of state organization.

⁵⁷See BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1913) 25.

⁵⁸See *Research in International Law. Harvard Law School.* (Supp. 1932) 26 AM. J. INT. L. 114. See especially, Art. 22 of the *Draft Convention on Diplomatic Privileges and Immunities*, *id.* at 115.

performance of official acts on behalf of the sending State by the diplomatic representatives of the latter.⁶⁰

The rules concerning diplomatic immunities and privileges can, for the most part, be traced back to customary international law. However, the scope of these privileges might be extended or restricted by way of international agreement. Thus, Article 7, Section 4 of the Covenant of the League of Nations provides that delegates of the members of the League and officials of the League shall enjoy diplomatic privileges and immunities when acting in official capacity. Also, Article 19 of the Statute of the Permanent Court of International Justice extends the same privileges and immunities to the members of the Court.⁶¹ After World War I there was a conspicuous tendency to extend diplomatic privileges to new types of international functionaries. By contrast, insistence on strict construction of the norms concerning diplomatic functions is to be encountered in recent agreements. An outstanding example of this is the Inter-American Convention on Diplomatic Officers, signed at Habana on February 20, 1928, which expressly provides that Foreign Diplomatic Officers "should not claim immunities which are not essential to the fulfillment of their official duties."⁶²

Another aspect of territorial sovereignty is the right of a State to impose tariffs, since the levy of customs duties is predicated upon the movement of goods from the territory of one State to the territory of another.

Customs autonomy under international law is, no doubt, one of the most significant features of territorial sovereignty. Although in principle unlimited,⁶³ customs autonomy is susceptible of limitations which may be brought about either by unilateral action of one State or by mutual international agreement.

A unilateral reduction of tariffs by adoption of a lower tariff level⁶⁴ does not in itself constitute a binding limitation on the discretion of the individual State, since it follows from the principle of customs autonomy that the same State may raise the tariff level at will. However that may be, the international effects of a unilateral reduction of tariffs will, for all intents and purposes, be the same as if the lowering of customs barriers had been attained

⁶⁰See Art. 20, *id.* at 107.

⁶¹See Art. 18, *id.* at 97.

⁶²See HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1943) 145, 313 ff.

⁶³THE INTERNATIONAL CONFERENCES OF AMERICAN STATES (1931) 420. *See also*, *Norms Concerning Diplomatic and Consular Functions* (1940) 2 *id.* at 351.

⁶⁴*See e.g.*, LIPPERT, *RECHTSBUCH DES INTERNATIONALEN FINANZRECHTS: CODE OF INTERNATIONAL FINANCIAL LAW* (1935) 206, 216, 501.

⁶⁵For the American practice, see TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* (8th ed. 1931).

by concerted action. The typical means by which a mutual tariff reduction can be achieved are Trade Agreements. The effectiveness of Trade Agreements has frequently been over-estimated for at least two reasons: first, the reduction of an autonomous tariff is often more apparent than real, because the high basic tariff which is reduced by a Trade Agreement might have been adopted for the sole purpose of improving the bargaining position of the State or the States which are parties to the agreement;⁶⁵ second, the application of the mutual advantages provided by a Trade Agreement might be hampered by various devices of administrative protectionism.⁶⁶

In general, the territory of a state and its customs territory coincide.⁶⁷ Yet by mutual agreement, exemptions from this rule have been established. In a customs union, for instance, customs boundaries are distinct from the political boundaries proper. The members of a customs union usually maintain their political frontiers unchanged while recognizing a "unity of the customs frontier and of the customs territory *vis à vis* third States."⁶⁸

To be sure, a customs union represents a limitation of sovereignty only with respect to the political entities that are united thereby. As for outsiders, a customs union may even mean an intensification of economic nationalism rather than a step towards overall economic cooperation.

Another device of limiting territorial sovereignty is the so-called demilitarized zone designed to restrict the territorial sovereignty of a State in military matters. Demilitarized zones are not necessarily confined to land frontiers. A regime of this kind may affect natural waterways, coasts, maritime canals and islands.⁶⁹

The frontier between the United States and Canada has often been referred to as the outstanding example of a demilitarized land frontier based upon international agreement. It should be borne in mind, however, that the mutual renunciation of fortifications ensued in this case by usage rather than by virtue of any formal international agreement, for the basic convention, the so-called Rush-Bagot agreement of 1817⁷⁰ regulates only the maintenance of naval forces in the Great Lakes district. Even if it is assumed

⁶⁵For the recent American Trade Agreements Program, see SAYRE, *THE WAY FORWARD: THE AMERICAN TRADE AGREEMENT PROGRAM* (1939); TASCA, *THE RECIPROCAL TRADE POLICY OF THE UNITED STATES: A STUDY IN TRADE PHILOSOPHY* (1938).

⁶⁶For administrative protectionism, see HEUSER, *CONTROL OF INTERNATIONAL TRADE* (1939) and BIDWELL, *THE INVISIBLE TARIFF* (1939).

⁶⁷Cf. Lippert, *op. cit. supra* note 63, at 206, 502.

⁶⁸P. C. I. J., Ser. A/B, No. 41, p. 51 (1931).

⁶⁹Cf. MARSHALL-CORNWALL, *GEOGRAPHIC DISARMAMENT* (1935) 57 ff.

⁷⁰Text in 1 MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS* (1910) 628. See also, 1 MOORE, *A DIGEST OF INTERNATIONAL LAW* (1906) 692.

that this agreement is still legally valid—a point which is not beyond doubt⁷¹—no express mutual obligation can be derived from it as to the demilitarization of the entire Canadian-United States border, which as a matter of fact has been upheld for more than a century.

The status of the Canadian-United States border, providing for reciprocal demilitarization,⁷² served as a pattern for similar regimes which have been established in Europe. Thus, the Swedish-Norwegian Treaty of October 26, 1905 created a demilitarized zone upon the basis of equality.⁷³ The most elaborate agreement of this kind is apparently the "Convention respecting the Thracian Frontier" of July 24, 1923.⁷⁴ Under the Convention it was forbidden to maintain any permanent fortifications or any depots of arms and war material within the demilitarized zone. No armed forces were to be stationed or moved within, or into, this region except those which were necessary to procure the internal order. No military or naval aircraft of any flag was allowed to fly through the demilitarized zone.

Whereas the above agreements on geographical disarmament impose a mutual obligation upon the contracting parties, there are other agreements which provide only for unilateral demilitarization. Articles 42-44 of the Treaty of Versailles, regarding the demilitarization of the Rhineland as well as the corresponding provisions of the TREATY OF LOCARNO (1925), furnish perhaps the most significant example of a unilateral territorial demilitarization.

C. Joint Exercise of Territorial Sovereignty

It follows from the general principles concerning territorial sovereignty⁷⁵ that in peacetime⁷⁶ under customary international law only the organs of one state are authorized to perform state functions within a given territory.⁷⁷ By mutual agreement, however, states have occasionally joined hands as to the exercise of territorial sovereignty.

(1) Coimperium and Condominium.—With reference to specific situations the joint exercise of territorial sovereignty by two states has been

⁷¹See MARSHALL-CORNWALL, *op. cit. supra* note 69, at 59.

⁷²*Id.* at 57.

⁷³For the text of the Convention of October 26, 1905, see DE MARTENS, NOUVEAU RECUEIL GÉNÉRAL DES TRAITÉS, etc., 2d Series (1907) 703. See also, MARSHALL-CORNWALL, *op. cit. supra* note 69, at 84, 88.

⁷⁴Text in (Supp. 1924) 18 AM. J. INT. L. 62.

⁷⁵See *supra* note 50.

⁷⁶The related problems of military occupation cannot be discussed here. For the international law of military occupation see OPPENHEIM, *op. cit. supra* note 44.

⁷⁷Cf. Judge Huber in the *Island of Palmas* (1928) 22 AM. J. INT. L. 877, "the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterium of territorial sovereignty."

called *condominium* or *coimperium*.⁷⁸ Although the two terms are usually considered as interchangeable it has been proposed to differentiate between them by reserving the term *coimperium* to those situations where joint rights of administration are conferred, whereas the term *condominium* would cover rights of administration plus the right to dispose of a territory.⁷⁹ In accordance with this distinction the legal status of the Sudan and the New Hebrides can be styled a *coimperium*.

The several agreements between Great Britain and Egypt⁸⁰ concerning the Sudan are designed to regulate, above all, the administration of the Sudan; but the agreement does not regulate the right of the contracting parties to cede the territory of the Sudan.

The joint exercise of the administration is emphasized time and again in these conventions. The treaty of alliance between Great Britain and Egypt (1936) provides for example: "The Governor General [of the Sudan] shall continue to *exercise on the joint behalf of the High Contracting Parties* the powers conferred upon him by the said agreements."⁸¹ Similarly, the protocol respecting the New Hebrides concluded between Great Britain and France on August 6, 1914⁸² contains elaborate provisions on the administration of the New Hebrides. Yet, it is silent on the question of who is ultimately authorized to cede the territory of the New Hebrides. On the whole, so long as the issue of the final disposal of the territory over which a *coimperium* is instituted is in abeyance or not sufficiently clarified in the related documents, it appears preferable to characterize the status of the Sudan and the New Hebrides as *coimperium* rather than as *condominium*.

(2) International Lease.—The lease of territory under international law may in certain cases involve a joint exercise of territorial sovereignty.⁸³

A state which acquires a lease on foreign territory for but a limited purpose is entitled to exercise those rights of territorial jurisdiction which are expressly conferred by the underlying agreement. In all other respects the lessor retains the rights of jurisdiction implied in "territorial sovereignty" since, according to a well established principle of international law, a

⁷⁸For an enumeration of historic examples of *condominium* see KUNZ, *DIE STAATEN-VERBINDUNGEN* (1929) 278.

⁷⁹*Cf.* VERDROSS, *VÖLKERRECHT* (1937) 132.

⁸⁰See Agreement between Great Britain and Egypt of January 19, 1899 in (1898-1899) 91 *BRITISH AND FOREIGN STATE PAPERS* 19; For the agreement of July 10, 1899 see *id.* at 21.

⁸¹See *Great Britain Treaty Series* No. 6 (1937) Cmd. 5360. *Cf.* in this connection: "Nothing in this article prejudices the question of sovereignty over the Sudan." *Ibid.*

⁸²For text see 12 MARTENS, *NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS* (3d ser.) 189.

⁸³See BATY, *THE CANONS OF INTERNATIONAL LAW* (1930) 404. See also, WILSON, *HANDBOOK OF INTERNATIONAL LAW* (3d ed. 1939) 93.

limitation of sovereignty is not to be presumed.⁸⁴ In international state practice there are many instances of limited purpose leases. Especially in the course of World War II has the United States concluded several agreements to this effect. By the Hull-Lothian Agreement of September 2, 1940, for example, the United States has acquired from Great Britain leases for the immediate establishment and use of naval and air bases in the Western Hemisphere for a period of ninety-nine years. Within the territories enumerated in this agreement the United States is authorized to exercise all powers "necessary to provide access to and defense of such bases and appropriate provisions for their control."⁸⁵

By contrast, the Hay-Varilla Convention of 1903⁸⁶ has granted to the United States extremely broad discretionary powers in regard to the Panama Canal zone. By virtue of this convention the United States enjoys, without any time limit, all the attributes of sovereignty necessary for the construction, maintenance, and protection of the Canal. To be sure, Panama preserves the "titular sovereignty,"⁸⁷ that is to say, the Panamanian government did not grant the territory as such⁸⁸ in perpetuity.

In legal situations where the lessee is authorized to proceed *as if* he would enjoy complete territorial sovereignty,⁸⁹ it may be misleading to speak of *joint exercise* of territorial sovereignty, since the jurisdiction of the lessor is in these cases virtually dormant. Under the circumstances the statement that "Sovereignty may be retained by the lessor state, even though complete jurisdiction be granted to the lessee,"⁹⁰ may mean: either that the dormant

⁸⁴See P. C. I. J., Ser. A, No. 24, p. 12 (1930). "In case of doubt a limitation of sovereignty must be construed restrictively."

⁸⁵U. S. DEPARTMENT OF STATE. EXECUTIVE AGREEMENT SERIES No. 181. For the question of the constitutionality of this agreement see McCLURE, *INTERNATIONAL AGREEMENTS* (1941) 395 ff. For additional instance of limited purpose leases see WILSON, *op. cit. supra* note 83, at 93 ff.

⁸⁶Text in 33 STAT. 2234 (1903).

⁸⁷See Mr. Taft's statement in PADELFORD, *THE PANAMA CANAL IN PEACE AND WAR* (1942) 50, n. 35.

⁸⁸*Id.* at 47. It is a controversial issue whether or not the United States has leased the territory of the Canal zone. Professor George Grafton Wilson ostensibly considers the legal status of the United States in the Canal zone as based upon a lease. See WILSON, *op. cit. supra* note 83, at 95. Professor Padelford in his monograph on the Canal Zone states: "It is notable that Panama did not cede, sell, or lease the territory for the Canal zone. . . ." *op. cit. supra* note 87, at 45 ff. Mr. Alfaro in his letter (January 3, 1923) to Secretary Hughes wrote as follows: "It is proper to remark that the zone has not been sold, transferred, or alienated by the Republic of Panama to the United States in full ownership . . . the Canal zone has not even been leased to the United States." 2 U. S. FOREIGN RELATIONS (1923) 645. (Italics supplied).

⁸⁹Assuming that the Panama Canal Zone has been leased to the United States, the Canal Zone would be a case in point.

⁹⁰See WILSON, *op. cit. supra* note 83, at 95.

rights of the lessor may or will be revived at a later date; or that the lessee is not entitled to cede, sell, or otherwise dispose of the leased territory, but that these rights are reserved to the lessor.

(3) Sovereignty Over the Air Space.—The current discussion on "freedom of the air" entails to a certain extent problems of joint exercise of territorial sovereignty.

Under customary international law every state has complete and exclusive sovereignty over the air space above its territory.⁹¹ By mutual agreement this rule can be modified and a state may grant to another the right of using its air space.⁹² Actually, a great number of international agreements furnish evidence of limitations of sovereignty over the air space.⁹³

In theory the following main types of legal relationships between states concerning air sovereignty are conceivable: (1) State *A* excludes State *B* from its air space; (2) State *A* grants to State *B* equal rights within the territory of State *A*;⁹⁴ (3) State *A* acquires from State *B* by reciprocal agreement the same rights which State *B* acquires in the territory of State *A*;⁹⁵ (4) State *A* grants State *B* virtually all essential rights and retains just the so-called *nudum jus* at its air space.

Moreover, the bilateral agreement between States *A* and *B* may be an exclusive one, that is to say, only State *B* acquires rights *vis-a-vis* State *A*; or the bilateral agreement may be just one among several agreements of an identical or similar content.⁹⁶

Now, whenever State *A*, without acquiring corresponding rights from State *B*, grants to State *B* rights of innocent passage, emergency landings, service landings, or commercial landings,⁹⁷ such practice obviously implies joint exercise of the sovereignty over the air space of State *A* by States *A* and *B*. Also, in case reciprocal rights are granted, the contracting parties are authorized to exercise jointly the sovereignty over the air space of States *A* and *B*.⁹⁸

At all events, if International Air Transport is to be encouraged after the

⁹¹See Art. 1 of the Convention on the Regulation of Aerial Navigation. Opened for signature at Paris, October 1919. LEAGUE OF NATIONS. TREATY SERIES 173. This article merely codifies a generally recognized principle of international law.

⁹²See Art. 15, § 3 of the above Convention.

⁹³For a discussion of the nature of these conventions see LISSITZIN, INTERNATIONAL AIR TRANSPORT (1942) 366.

⁹⁴For these rights, see *Universities Committee on Post-War International Problems. Problem XIII. International Air Traffic after the War* by Kenneth Colegrove, p. 11.

⁹⁵*Ibid.*

⁹⁶See LISSITZIN, *op. cit. supra* note 93, at 366.

⁹⁷See *supra* note 94.

⁹⁸See *supra* note 94.

cessation of hostilities, international agreement concerning the joint exercise of sovereignty over the air space will have to be reached.

By and large, governments and business aiming at the expansion of International Air Transport will attempt to counteract the still prevailing tendency of individual states to retain the exclusive jurisdiction over their air space. Conversely, individuals and states for whom military security is the prime consideration will in all probability insist on exclusiveness *usque ad coelum*.⁹⁹

V. SOVEREIGNTY AND TIME

A. Time and international personality

The exercise of the functions of an independent state is limited in time as well as in space. It may suffice to illustrate this statement by reference to the recognition or non-recognition of independent States, for it is one of the purposes of the recognition of a State, to ascertain the beginning or the end of an independent State. The time element is of great importance especially with respect to foreign State acts, since the validity of legal acts is contingent on space and time. The true function of a *de jure* recognition consists in officially declaring the moment in which a new State assumes its normal functions under international law.

The need for exactly determining the time factor has also been emphasized in the recommendation of the Institute of International Law, which would require, in any *de jure* recognition, an indication of the date when a new State begins to exist.¹⁰⁰

While it is one of the functions of the recognition of a State to confirm in a formal manner the legal existence of an independent State, it might be one of the purposes of non-recognition to uphold the legal validity of acts of a State whose existence is disputed.¹⁰¹ If the Stimson doctrine, for instance, sets forth the principle of non-recognition with respect to conquest by force, it implicitly aims at recognizing the authority of the occupied

⁹⁹For a possible change of the meaning of "Sovereignty *usque ad coelum*" in connection with the development of stratosphere or substratosphere flying see LISSITZIN, *op. cit. supra* note 93, at 410.

¹⁰⁰*Cf.* RESOLUTIONS ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW, at Brussels, April 1936 (Supp. 1936) 30 AM. J. INT. L. 185. Art 7. "Recognition *de jure* is retroactive in its effects from the date when the new State actually began to exist as an independent State. It is desirable that this date should be definitely indicated in the act of recognition."

¹⁰¹For related problems see Borchard, *The Unrecognized Government in American Courts* (1932) 26 AM. J. INT. L. 261; See also, Briggs, *Relations Officieuses and Intent to Recognize: British Recognition of Franco* (1940) 34 AM. J. INT. L. 47; Briggs, *Non-Recognition in the Courts: The Ships of the Baltic Republics* (1943) 37 AM. J. INT. L. 585.

or conquered State even after the occupation or conquest has been completed.¹⁰²

B. *The Act of Recognition*

From the viewpoint of the recognizing state too, the act of recognition contains a time element; and the often misleading distinction between *de facto* and *de jure* recognition is related to the time concept. Accordingly, these two types of recognition have recently been defined by the Institute of International Law by characterizing *de facto* recognition as the provisional and *de jure* recognition as the permanent type of recognition.¹⁰³

Since the recognizing State grants *de jure* recognition with the intention of permanency, it has been proposed to consider this act as irrevocable.¹⁰⁴ As for the recognized State, *de jure* recognition implies the expectation on the part of the recognizing State that the recognized political entity will last.¹⁰⁵

C. *Time and norms*

In international law, as well as in any other field of law, the time element is essential in ascertaining the legal validity of international norms and acts. Thus, time is a significant factor as regards the sources of international law.

The time effect¹⁰⁶ of customary international law, or the "general principles of law recognized by civilized nations," can hardly be determined with great exactitude. But international treaties and certain unilateral acts such as notification include, frequently, definite provisions regarding the time effect. Some treaties emphasize the "eternal" character while others contain special clauses concerning their duration, renunciation, or renewal. It is also obvious that the political effect of international treaties is contingent on the time factor, because long term agreements are apt to enhance international confidence and good faith, whereas short term agreements do not

¹⁰²For the text of Secretary Stimson's letter to Senator Borah, February 24, 1932, see 26 AM. J. INT. L. 343 (1932). Cf. also, Point 6 of the Preamble to the *Convention* drafted at the *Second Meeting of the Ministers of Foreign Affairs* (Habana, July 24-31, 1941). "That by virtue of a principle of American international law, recognized by various conferences, the acquisition of territories by force cannot be permitted." (1940) 3 DEPT OF STATE BULL. 145.

¹⁰³Cf. Art. 3 of the *Resolutions adopted by the Institute of International Law*, at Brussels, April 1936. "Recognition is either definite or complete (*de jure*) or provisional or limited to certain juridical relations (*de facto*)." Cf. also, Art. 5, Art. 7. (Supp. 1936) 30 AM. J. INT. L. 185.

¹⁰⁴Cf. Art. 5, *ibid.* "Recognition *de jure* is irrevocable; it ceases to have effect only in case of the definite disappearance of one of the essential elements whose conjunction was established at the moment of recognition."

¹⁰⁵Cf. VERDROSS, *VÖLKERRECHT* (1937) 140.

¹⁰⁶The term "time effect" refers to the time when a rule of law is effective.

usually contribute very much to dispelling international distrust and uncertainty.

Unfortunately, the exact determination of the time effect of international treaty norms is in general rather difficult.¹⁰⁷ Even more obscure is the time effect of international unilateral acts.¹⁰⁸ In any case, the prevailing uncertainty as to the actual moment when an international treaty is put into effect or when such treaty becomes inoperative should not detract from the basic principle that international norms and acts are limited in time.

¹⁰⁷For this problem, see Deák, *Computation of Time in International Law* (1926) 20 AM. J. INT. L. 502. For the time effect of treaties, see Reiff, *The Proclaiming of Treaties in the United States* (1936) 30 AM. J. INT. L. 63.

¹⁰⁸See PFLUGER, *DIE EINSEITIGEN RECHTSGESCHÄFTE IM VÖLKERRECHT* (1936) 334. See also, Eagleton, *The Form and Function of the Declaration of War* (1938) 32 AM. J. INT. L. 19.